No. 794.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a National Banking Association, *Appellant*,

vs.

WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and

JOSEPH H. SCOTT, as Tax Collector of said City and County,

Appellees.

Cleveland Trust Company vs. _Lander_, 184 U.S., 111, and remarks of counsel for appellant thereon.

T. I. BERGIN,

Counsel for Appellant.

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FILED

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NORTHERN DISTRICT OF CALIFORNIA.

THE NEVADA NATIONAL BANK OF SAN FRANCISCO, a national banking association, *Appellant*, vs. WASHINGTON DODGE, as Assessor of the City and County of San Francisco, State of California, and JOSEPH H. SCOTT, as Tax Collector of said City and County, *Appellees*.	No. 794.

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This case, *Cleveland Trust Company* vs. *Lander*, 184 U. S., 111, was decided subsequently to the submission of the case at bar. It was wholly unknown to counsel for appellant at the time of the argument and submission of the case.

Upon cursory perusal it might be taken as controlling, if not decisive of the case at bar, and hence we ask permission from the Court to submit the following remarks upon it.

Every State in the Union is entitled to adopt its own revenue system. It may mould and shape the same so as to best suit the interests or convenience of its citizens. Unless such system contravene some provision of the Constitution of the United States or some act of Congress of the United States enacted in pursuance thereof, it is entitled to full force and effect. The courts of each State are the appropriate exponents of its provisions. The Federal courts will respect such system. The decisions of the respective State construing the same are there regarded as controlling and authoritative. Upon these principles and for the following reasons that case is neither controlling nor decisive of the case at bar.

1. The provisions of the Constitution of the State of California upon the subject of revenue in a most important particular differ from those of the other constitutions of the various States of the Union in providing that "all property in this State, *not exempt under the laws of the United States*, shall be taxed in proportion to its value to be ascertained as provided by law." (Sec. 1, Art. XIII, Const. of Cal. *Vide* Appellant's Points and Authorities, pages 4–8.)

The case (*Cleveland Trust Company* vs. *Lander*,

111–114) is decided upon authority of *Van Allen* vs. *Assessors*, 3 Wall., 573, upon the ground that:

"The Court asserted a distinction between the property of the bank and corporation as such, and the property of the shareholders as such, and held that the tax authorized by the statute was a tax on the shares, *the property of the shareholder*, not a tax on the capital of the bank, the property of the corporation."

The Chief Justice and Justices Wayne and Swayne dissented from the opinion of the Court in *Van Allen* vs. *Assessors*, and their views upon the point here in question are expressed in 3 Wall., 598 and following.

The views of the Chief Justice and his associates there expressed were approved and adopted by the Supreme Court of this State in *Burke* vs. *Badlam*, 57 Cal., 594, the Court remarking (page 601):

"This property is held by the corporation in trust for the stockholders, who are the beneficial owners of it in certain proportions called shares, and which are usually evidenced by certificates of stock. The share of each stockholder is undoubtedly property, *but it is an interest in the very property held by the corporation.* It is his right to a proportionate share of the dividends and other property of the corporation—nothing more. When the property of the corporation is assessed to it, and the tax thereon paid, who but the stockholders pay it? It is true that it is paid from the treasury of the corporation before the money therein is divided, but it

is substantially the same thing as if paid from the pockets of the individual stockholders. To assess all of the corporate property of the corporation, and also to assess to each of the stockholders the number of shares held by him, would, it is manifest, be assessing the same property twice—once in the aggregate to the corporation, the trustee of all the stockholders, and again separately to the individual stockholders, in proportion to the number of shares held by each."

That case was an application for a writ of mandate compelling the assessor "to assess * * * to various holders of certificates of stock in various corporations the respective shares held by them, and to assess the various depositors in various savings banks the respective sums of money deposited by them." (57 Cal., 599.)

If the interests of the stockholder in the stock of the corporations therein referred to constituted assessable property within the meaning of the revenue system of the State of California, of course the assessor would be bound to assess the same, and the Court would be equally bound to compel him to assess it. The Court, however, denied the application for the writ, thus establishing that under the revenue system of this State the interest of the stockholder in a corporation does not constitute assessable property as recognized under the constitution and laws of this State. Had such interest constituted such property, the duty of the assessor and of the Court would be equally clear, and the right to

the writ would necessarily follow. But the writ was denied, and denied upon this distinct ground. Whatever, therefore, may have been the proper construction of the provisions of the revenue system of the State of New York involved in the case of *Van Allen* vs. *Assessors*, or in any other case, the Supreme Court of this State has thus authoritatively declared that under the constitution and revenue laws of the State of California, the interest of the stockholder in a corporation does not constitute assessable property; that to assess the same, and at the same time to assess the property of the corporation, would constitute *double taxation*, not allowed under the Constitution of California. It is needless to say that this case, decided at the January term of 1881, has ever since remained the law of the State of California. This decision, therefore, demonstrates the inapplicability to the case at bar of the doctrine established in *Van Allen* vs. *Assessors*, 3 Wall., 573, upon the authority of which *Cleveland Trust Company* vs. *Lander*, 184 U.S., 111, was decided, and shows that the latter case is neither controlling nor decisive of the question involved in the case at bar.

Upon authority of the views of the Chief Justice and Justices Wayne and Swayne thus approved and ripened into judgment in *Burke* vs. *Badlam*, there can, of course, be no question of the right of the stockholder in the assessment of his stock to the benefit of all deductions arising from corporate investments of a Federal

character precisely the same as if he personally had made the investment, and not the corporation, his mere representative acting on his behalf.

We have felt constrained to thus call the attention of the Court to these views, as the question here involved is one of constitutional law not affecting merely the parties to the record, but affecting all persons who may be interested in the question of taxation involved in it. All are equally entitled to the equal protection of the law, and are only bound to bear the same proportionate share of the burden of taxation. All are equally entitled to the same rights and immunities, and hostile discrimination against one class of persons as against another class engaged in the same line of business, under whatever guise the same may assume, is unconstitutional and should meet with condemnation at the hands of the Court. (*Connolly* vs. *Union Sewer Pipe Company*, 184 U. S., 564.)

Trusting that we may be pardoned for thus trespassing upon the attention of the Court, we respectfully submit these views.

Dated September 22d, 1902.

T. I. BERGIN,
Counsel for Appellant.